U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARRION L. TRYON and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

Docket No. 99-1807; Submitted on the Record;
Issued May 10, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of total disability on or after July 1, 1987 due to her employment injury.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order[1] on February 6, 1996 in which it set aside the January 3 and May 24, 1994 decisions of the Office of Workers' Compensation Programs with respect to appellant's entitlement to disability compensation for intermittent periods after July 1, 1987 and reversed the January 3 and May 24, 1994 decisions of the Office with respect to the termination of appellant's compensation for medical treatment after June 14, 1987. The Board remanded the case to the Office for further evidentiary development regarding whether appellant sustained employment-related disability after July 1, 1987. The Board found that the Office improperly determined that the weight of the medical opinion, regarding appellant's entitlement after July 1, 1987, rested with the opinion of Dr. Bernard B. Franklin, a Board-certified orthopedic surgeon who served as an impartial medical examiner.[2] The Board found that the opinion of Dr. Franklin was not sufficiently well-rationalized regarding appellant's employment-related disability after July 1, 1987 to constitute the weight of the medical evidence on this matter. The Board further determined that the medical evidence was sufficient to require further evidentiary development of the case regarding the extent of appellant's employment-related disability.[3] The Board also

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[1] Docket No. 95-91.

[2] The Office had accepted, based on Dr. Franklin's opinion, that appellant sustained employment-related bilateral carpal tunnel syndrome. Appellant returned to work in light-duty positions beginning June 14, 1987 and claimed that various work stoppages beginning July 1, 1987 were employment related; she resigned from the employing establishment in October 1991. The Board noted that the Office properly referred appellant to Dr. Franklin for an impartial medical examination in that there had been a conflict in the medical evidence between Dr. Cranford L. Scott, an attending Board-certified internist, and Dr. Carl J. Orfuss, a Board-certified neurologist to whom the Office referred appellant for a second opinion.

[3] The Board indicated that the evidentiary development should include an effort to determine the duties of the

found that the medical evidence showed that appellant was entitled to compensation for medical treatment after June 14, 1987 due to continuing residuals of her employment-related injury. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

Upon remand to the Office as directed by the Board, the Office referred appellant and the case record to Dr. Charles H. Alexander, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding whether appellant had a recurrence of total disability on or after July 1, 1987 due to her employment injury.[4] The record was supplemented to include information regarding the duties of the light-duty positions to which appellant returned for intermittent periods beginning June 15, 1987. By decision dated September 23, 1997, the Office denied appellant's claim that she sustained a recurrence of disability on and after July 1, 1987 due to her employment injury and bilateral carpal tunnel syndrome.[5] The Office determined that the weight of the medical evidence rested with the opinion of Dr. Alexander. By decision dated February 18, 1999, the Office denied modification of its September 23, 1997 decision with respect to appellant's claim for recurrence of total disability.[6]

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after July 1, 1987 due to her employment injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[7]

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8] In the present case, the Office

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light-duty positions to which appellant returned for intermittent periods beginning June 15, 1987.

[4] Prior to the referral to Dr. Alexander, the Office had referred appellant to several physicians for an impartial medical examination; appellant did not complete an appointment with any of these physicians. On one occasion, appellant visited a physician to whom she was referred and left prior to the completion of the examination.

[5] In its decision, the Office also appears to have effectively terminated appellant's medical benefits after June 14, 1987.

[6] The Office also determined that the September 23, 1997 decision improperly terminated appellant's medical benefits after June 14, 1987 and reversed this aspect of the September 23, 1997 decision.

[7] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[8] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

properly determined that there was a continuing conflict in the medical evidence between Dr. Scott, an attending Board-certified internist and Dr. Orfuss, a Board-certified neurologist to whom the Office referred appellant for a second opinion, regarding whether appellant had established employment-related recurrence of total disability on or after July 1, 1987.[9] Therefore, the Office correctly determined that the case should be referred to an impartial medical examiner for resolution of this conflict.

Appellant alleged that the referral to Dr. Alexander, a Board-certified orthopedic surgeon, was improper because she was not allowed to participate in the selection of an impartial medical examiner. She indicated that she should have been allowed to select a minority physician to serve as an impartial medical examiner. By decision dated October 23, 1996, the Office denied appellant's request to participate in the selection of the impartial medical specialist on the grounds that she had not provided an acceptable reason for participating in the selection process. The Office indicated that she had not established her claims of bias.

Office procedure provides examples of circumstances under which a claimant may participate in the selection of an impartial medical examiner. These examples include, but are not limited to, the following: documented bias by the selected physician; documented unprofessional conduct by the selected physician; a female claimant who requests a female physician when a gynecological examination is required; and certain circumstances when the claimant has a medically documented inability to travel to the office of the selected physician. If the reason is considered acceptable, the Office will prepare a list of three specialists, including a candidate from a minority group if indicated and ask the claimant to choose one. If the reason offered is not considered valid, a formal denial of the claimant's request, including appeal rights, may be issued if requested.[10]

The Board notes that the Office properly denied appellant's request to participate in the selection of the impartial medical examiner. The Office indicated that appellant did not present an acceptable reason for participating in the selection process because she did not submit any evidence to show that Dr. Alexander was biased against her or otherwise unable to perform a proper impartial medical examination.[11] Appellant does not have an absolute right to participate in the selection of the impartial medical examiner and the Office was not required in this case to allow appellant to participate in the process.[12] Therefore, the Office properly referred appellant to Dr. Alexander for an impartial medical examination.

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[9] Appellant continued to seek treatment from Dr. Scott and his associates in 1996.

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (March 1994).

[11] Appellant alleged that prior physicians to whom she was referred for an impartial medical examination were biased because they performed fitness-for-duty examinations for the employing establishment. There are some circumstances when a physician's performance of fitness-for-duty examinations for a employing establishment might prevent that physician from serving as an impartial medical examiner; *see Terrance R. Stath*, 45 ECAB 412, 423 (1994); FECA Bulletin No. 86-10. There is no evidence that the physicians in question performed fitness-for-duty examinations on a regular basis. Nor is there any evidence that Dr. Alexander performed such examinations.

[12] *See Larry B. Guillory*, 45 ECAB 522, 529 (1994). In support of her argument, appellant cited

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Alexander, the impartial medical specialist selected to resolve the conflict in the medical opinion. The June 9, 1997 report of Dr. Alexander establishes that appellant did not sustain a recurrence of total disability on or after July 1, 1987 due to her employment injury.

In his report, Dr. Alexander diagnosed bilateral carpal tunnel syndrome, status post carpal tunnel release; cumulative trauma disorder; and chronic musculotendinitis of both forearms, greater on the left. Dr. Alexander indicated that appellant exhibited full range of motion of both shoulders, elbows and wrist. He noted that appellant showed some tenderness to palpation of the wrists and left forearm, but that she had paresthetic feelings in both hands which were nonanatomical. Dr. Alexander described the duties of appellant's light-duty positions and noted that they were sufficiently light in nature that she would have been able to perform them; he noted that appellant's duties allowed her to work at her own pace.[13] Dr. Alexander stated, "Based on the medical reports and my examination, it is my opinion that the patient was not totally disabled on June 15, 1987 until January 4, 1989 she could have worked at the job provided."[14]

The Board has carefully reviewed the opinion of Dr. Alexander and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Alexander provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing, and reached conclusions regarding appellant's condition which comported with this analysis.[15] He provided medical rationale for his opinion by explaining that the extent of appellant's upper extremity condition was limited in nature and was of such a character to allow her to perform her light duties at the employing establishment after July 1, 1987.

The decision of the Office of Workers' Compensation Programs dated February 18, 1999 is affirmed.

Chapter 3400.3(a) of the Federal (FECA) Procedure Manual, a subsection which she believed entitled her to select an impartial medical examiner from a list prepared by the Office at her request. The Board notes, however, that this procedure was no longer in effect at the time of appellant's claim in that it was superceded by Chapter 3.500.4(b)(4); *see supra* note 10 and accompanying text.

[13] He stated that after her carpal tunnel surgery, appellant asserted she had at least 80 percent relief from her symptoms and indicated that, therefore, appellant should have been able to perform such light duties.

[14] Dr. Alexander noted appellant was symptomatic in her arms and was "quite disabled because of it." However, he noted that appellant's condition was influenced by a nonwork-related depression and did not indicate that her symptoms rendered her totally disabled after July 1, 1987.

[15] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

Dated, Washington, D.C.
May 10, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member